88-1549

NO.____

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

SUSAN DIANE MENKE, Petitioner

v.

STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI
To the Texas Court of Appeals
for the Fourteenth Supreme
Judicial District (Houston)

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QUESTIONS PRESENTED

Sole question: Has there been a violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States where the State Trial Court refused to allow Petitioner to introduce documents and testimony impeaching the credibility of the States' sole witness to the transaction, an alleged accomplice, and demonstrating his bias and motive in testifying.

INTERESTED PARTIES

Susan Diane Menke

State of Texas

Harris County District Attorney

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The Clerk will enter our appearance as Counsel for the Petitioner.

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To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

SUSAN DIANE MENKE, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the Fourteenth Supreme Judicial District (Houston), rendered against her on November 5, 1987, and

styled "Susan Diane Menke v. State of Texas." Petitioner's Motion for the Texas Court of Criminal Appeals of Petition for Discretionary review was denied on January 18, 1988.

CITATIONS TO THE OPINIONS BELOW

The opinion of which review is sought is reported as Susan Diane Menke v. The State of Texas (see Appendix A) which was rendered on November 5, 1987 by the Fourteenth Court of Appeals for the State of Texas (Houston) . Earlier the Petitioner had been convicted following a jury trial in the 183rd Judicial District Court of Harris County, Texas (see Appendix B). The Texas Court of Criminal Appeals denied the Petition for Discretionary Review on January 18, 1989 (see Appendix C).

JURISDICTION

The Texas Court of Criminal Appeals having denied the Petition for Discretionary Review on January 18, 1989, the Petitioner now invokes this Court's jurisdiction pursuant to 28 U.S.C., Section 1257 in that she seeks timely review of a final State Court judgment based upon a deprivation of the citizen's right under the Sixth and Fourteenth

Amendments to the Constitution of the United States to confront her accusers. (see Appendix D)

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition is founded upon the Sixth Amendment to the United States Constitution which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him." (see Appendix D)

STATEMENT OF THE CASE

The Petitioner was convicted by a jury of the offense of theft and sentenced to four years in the Texas Department of Public Corrections. The State charged that two thefts were committed and amounts obtained pursuant to one scheme and a continuing course of conduct. The State's entire case depended upon the testimony of a Mr. William Ryan, an alleged accomplice. While it was Mr. Ryan's direct testimony that the State used exclusively to convict, the defense was not afforded a constitutionally fair opportunity to cross-examine this key witness.

The defense theory rested solely upon discrediting the self-serving testimony of Mr. Ryan. It was crucial for the defense to show that it was he, Ryan, who was the criminal, not the Petitioner. The witness, Ryan, had fully cooperated with the government in hopes of beneficial treatment.The Petitioner,

however, argued that she had been duped by Ryan who had committed similar acts with other parties. The Court, by preventing this crucial cross-examination , prevented the defense from exposing the witness, Ryan.

The issue of a denial of the Sixth Amendment right to confrontation was timely raised in the Appeal to the Fourteenth Court of Appeals for the State of Texas and in the Petition for Discretionary Review to the Texas Court of Criminal Appeals, the highest Appellate Court hearing criminal matters in the State of Texas. (See Opinion of the Fourteenth Court of Appeals, Appendix A; Appellant's Petition for Discretionary Review, Appendix C,) The Court of Appeals ruled that any error relating to the question of cross-examination was harmless.

REASONS FOR GRANTING WRIT OF CERTIORARI

When the key state witness against a citizen accused is also an alleged accomplice and the only fact witness to the actual transaction offered by the State, the right of cross-examination should be extended to afford the citizen her full Sixth Amendment right to confront her accuser. In this case, the citizen was prevented from important cross-examination and impeachment of the only fact witness to the actual transaction for the State on issues directly

at the heart of her defense, and as such, this Court should grant the Writ of Certiorari to protect these important Sixth Amendment interests.

There were two distinct occasions relating to the cross-examination which, when combined, demonstrate a denial of Sixth Amendment rights.

A. The Court denied trial counsel the opportunity to conduct an effective cross-examination of the State's chief witness against Petitioner. The Sixth Amendment to the United States Constitution embraces the generally protected right to confrontation. See also, Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974). An accused's right to confront witnesses against him and, through reasonable cross-examination, place the witness in his proper setting have long been essential to a fair trial. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed.2d 624 (1931); Davis v. Alaska, 415 U.S. 308.

In this case, the State's chief witness against Petitioner was William Ryan. Effective cross-examination was trial counsel's primary means of discrediting Ryan. However, the Trial Court repeatedly and erroneously cut off counsel's efforts at proper cross-examination.

The Trial Court's improper rulings to this matter began at the pre-trial hearing. In volume V at page 18, trial counsel sought to introduce checks that Ryan admittedly had forged from 1978 to 1984.

Ryan would issue the checks to different fictitious payees, then he would sign his name and forge a trustee's name. Such a scheme is extremely similar to the scheme the State alleged in the Petitioner's case. And so trial counsel argued:

> THE COURT: ... What is the relevancy?
>
> MRS. ROSEN: In connection with the two checks in this case that were paid to Ms.
> Menke by Hermann Hospital Estate, by his own statements, he forged the name of
> John Coffee, a trustee. He had previously forged his name on these other checks and, Your Honor, it establishes a pattern that he had followed for lo the many years, showing his practice of what he had done in the past, and I think in that regard, it is exculpatory. For example, if he now comes up with the idea: Well, it was Ms. Menke's idea, or we worked together to determine I was going to forge these signatures. If we can demonstrate, Your Honor, that he indeed had a practice of and had perfected the forging of the signature of Mr. Coffee and the other trustees, over her intent, Your Honor, and the requi

> site elements that are required in this case.
>
> (R. V, p. 18) (see Appendix E)

In reply to trial counsel's argument, the prosecuting attorney responded that Texas law precluded defense counsel from impeaching Ryan with either indicted or unindicted acts. The Trial Court sustained the objection.

The prosecuting attorney's argument led the Court into constitutional error. Davis v. Alaska, 415 U.S. 308, established that a

> cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness. 94 S.Ct. at 1110.

In this case, Ryan had been stealing from the Hermann Hospital Estate since 1979 by causing checks to be issued to fictitious payees, sometimes with authentic trustees' signatures and sometimes with forged signatures, then co-signing his own name. Cross-examination should have been allowed on this issue. Trial counsel was correct when she argued that the evidence of Ryan's past forgeries was

exculpatory as to Petitioner. If trial counsel had been permitted to place Ryan in his proper setting, the jury likely would have seen that the theft was Ryan's brainchild and Petitioner was used in that scheme.

The prosecuting attorney's objections to trial counsel's attempts at effective and proper cross-examination continued to be erroneously sustained by the Trial Court. For example, trial counsel asked Ryan:

> Q: You had forged Mr. Coffee's signature on many occasions, had you not?
>
> Mr. Stricklin: Objection, Your Honor. Irrelevant.
> The Court: Sustained. Don't answer
>
> (R. IX p. 201) (see Appendix F)

And:

> Q: And you testified that you signed your name and you forged Mr. Coffee's name? (on commission check to Petitioner)
>
> A: That's correct.
>
> Q: That was not the first time that you had forged Mr. Coffee's name?

Mr. Stricklin: Objection.

The Court: Sustain the objection.

(R. IX p. 267) (see Appendix F)

Trial counsel also attempted to offer into evidence several checks Ryan had previously forged. These forged checks should have been allowed into evidence because they tended to show that Petitioner was just another pawn in Ryan's long-term scheme of defrauding the Estate. All of the above questions were proper cross-examination because they placed Ryan's testimony against Petitioner in its proper setting. The documents and questions would
have exposed to the jury the facts from which jurors could appropriately draw inferences relating to the credibility of the witness. Alford, 282 U.S. 687; Davis, 415 U.S. 308.

The denial of cross-examination did severely prejudice the Petitioner. Trial counsel was not allowed to develop her defensive theory. Menke was denied the right to have the jury understand the extent of Ryan's scheme of fraud upon the Estate. Had the jury been privy to the extent of Ryan's thievery, they may well have concluded that Petitioner was Ryan's pawn, not his accomplice. Failing to allow defense counsel to pursue effective cross-

examination, placing Ryan in the proper setting, thereby showing the jury that Ryan was a master thief who had to have used many other individuals besides Menke during his long-term fraud perpetrated on the Hermann Hospital Estate amounted to error of constitutional magnitude. Davis v. Alaska, 415 U.S. at 318, 99 S.Ct. at 1111.

In sum, the evidence concerning Ryan's massive scheme of theft from the Estate and his concomitant motive for using Petitioner to further his scheme was erroneously excluded. The Trial Court committed a "constitutional error of the first magnitude" by denying trial counsel the opportunity to effectively cross-examine the State's chief witness against Petitioner. Davis, 415 U.S. 308. The Court of Appeals and Court of Criminal Appeals erred by failing to recognize the Sixth Amendment violation. While the Court of Appeals found "error", the Court found such to be harmless error. That finding is in violation of the rule stated by this Court in Davis, 415 U.S. 308.

B. The Court also violated the Petitioner's Sixth Amendment rights by refusing to allow cross-examination or impeachment by use of certain tape recordings made by the prosecutor's office of the only state fact witness to the transaction, Mr. Ryan.

While the Court of Appeals found that the exclusion of this cross-examination/impeachment was

error, it also found such was harmless.

In this case, many tape recordings were made wherein Ryan informed the District Attorney's office of allegedly illegal activity at the Hermann Hospital Estate. Of those tapes, the tapes made on January 17, 1985, February 13, 1985 and March 1, 1985 specifically concerned the crime with which Petitioner was charged. The transcript clearly shows that these tapes consist of Ryan telling his story to the prosecutor, with no work product intermingled.

During cross-examination, trial counsel attempted to have the tapes produced for impeachment purposes. Her examination concerned Ryan's prior statements made about the first commission check given to Susan Menke. During direct, Ryan had testified at trial that he forged Trustee Coffee's signature on the check. However, during the tape recorded interviews with the prosecutor, Ryan stated that Coffee's signature was not forged. At trial, he testified as follows:

> Q: (By Mrs. Rosen) ... I'm asking if that is with reference to that check, you did not make the statement, on the tape recording that Mr. Coffee actually signed the check?
>
> A: (By Ryan) I don't remember.

(R. IX p. 203) (see Exhibit F)

At which point trial counsel properly requested, for impeachment purposes, the tape recording made February 13, 1985. She even was ready with the exact footage where the statement appeared. The Judge overruled her request.
(R. IXp. 203, see Exhibit F)

Had defense counsel been allowed to properly use the tapes for impeachment, she could have demonstrated to the jury that Ryan did in fact tell the prosecutor that Coffee signed the first commission check given to Petitioner, and he was probably lying when he said he did not remember in answer to Mrs. Rosen's question. The question of whether Trustee Coffee actually signed the check was critical to the jury's estimate of the truthfulness and reliability of a given witness and may well have been the determination of guilt or innocence. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

Petitioner was harmed because the jury was not allowed to see the witness Ryan for what he was a master thief who had been duping people for years. See Olden v. Kentucky, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988)

SUMMARY

Recently this Court, in Olden v. Kentucky, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), had occasion to state what factors should be considered in determining whether the exclusion of the potential cross-examination was reversible error under the Sixth Amendment.

The Court Will look at (1) the importance of the witness' testimony, (2) whether it was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony on material points, (4) the extent of cross-examination that was permitted, and (5) the overall strength of the State's case.

This is a case where an admitted thief and liar provided the only evidence of the actual transaction against the Petitioner. This is a case where there is no independent corroboration, and where the strength of the State's case rises or falls based upon Ryan's testimony.

When these two Sixth Amendment errors are analyzed together, we see that while the witness Ryan was indeed strongly cross-examined, key weapons in that cross-examination were taken away from the defense. The denial of the cross-examination and impeachment evidence requested made some of the cross-examination look speculative.

Had the defense been permitted to show the extent of Ryan's invlovement in as scheme of fraud (i.e., that he was the mastermind stealing from the Estate using this same form of fraud some five years before he even met the Petitioner), the defensive theory would have been tremendously aided. If, further, the excluded tape recordings had been permitted to show that Ryan was not only a liar, but was specifically lying in the courtroom that day, the defensive theory would have clearly been advanced.

This Court, in Olden, 109 S.Ct. 480, has established a sliding scale approach to the right of cross-examination. That approach would indicate that, when an accused is confronted by only one fact witness (an alleged accomplice) and where there is every reason to suspect a deal has been made between the State and that witness, then the Court is very protective of the citizen's right to fully explore and cross-examine the setting of the witness, as well as his prior inconsistencies.

The error at trial might be considered harmless under the Texas Court's interpretation of the law, but it most certainly resulted in a violation of the Sixth Amendment by leading to the conviction of the Petitioner under the Court's interpretation of the Sixth Amendment to the Constitution of the United States.

For all these reasons, the Petitioner respectfully requests that the Writ of Certiorari be granted to the

Texas Court of Appeals for the Fourteenth Supreme Judicial District (Houston).

Respectfully submitted,

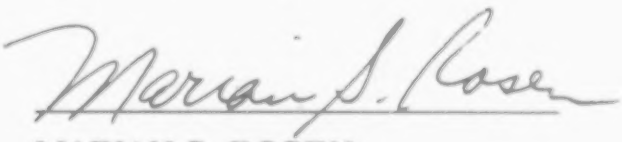
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CERTIFICATE OF SERVICE

I, Marian S. Rosen, attorney for Petitioner, herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of March, A.D., 1989, I served a copies of the foregoing Petition for Writ of Certiorari upon Johnny B. Holmes, Harris County District Attorney, 201 Fannin, Houston, Texas 77002, by hand delivery.



MARIAN S. ROSEN

Appendix A

Affirmed and Opinion filed November 5. 1987.

In the Fourteenth Court of Appeals

NO. A14-86-00208-CR

SUSAN DIANE MENKE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 420, 401

OPINION

The jury convicted the appellant, Susan Diane Menke (appellant of Menke) of theft. The trial court assessed her punishment at four years. This appeal follows.

Appellant brings six points of error. First, she says that the evidence is insufficient to support the jury's findings on two questions. One is whether the appellant knowingly took money without the effective consent of the owner. The other is whether she

took property with the intent to deprive the owner of its property. Second, the appellant asserts that the trial court erred in failing to give the jury one of the appellant's two requested charges regarding the precise offense alleged in the indictment. Third, the appellant claims that the trial court erred in refusing her requested charges on what she styles "affirmative defenses." Fourth, the appellant says that the trial court denied her counsel the opportunity to conduct an effective cross examination of an important State witness, William B. Ryan (Ryan). Sixth, the appellant asserts that the trial court erred in failing to allow her to use Ryan's recorded statement to impeach him.

Menke's involvement with the Hermann Hospital Estate (Estate) began quite innocently. Once a school teacher, she had changed careers and become a real estate broker. In an effort to procure new business, Menke telephoned the Estate to locate the person in charge of the Estate's real estate transactions. Her call was transferred to Ryan. She explained to Ryan that she was a broker who specialized in land located in Fort Bend County. Ryan arranged to meet with Menke for half an hour on the following day, April 19, 1983.

At that meeting Ryan explained to Appellant that he was an employee whom the board of trustees had hired to assist in managing the Estate. His title was Vice President and General Manager. He described

to Menke various parcels of land and their prices. In addition, he informed her of the policy of the board of trustees not to grant exclusive listings on Estate properties. In early May, Ryan picked Menke up at her place of business and showed her several properties located in Fort Bend County.

Before the appellant and Ryan ever met, James MacNaughton had offered to purchase Estate property located in Fort Bend County. Although the trustees rejected Mr. MacNaughton's original offer, they approved the sale approximately ten days after Menke and Ryan met. Ryan informed Menke during the summer of 1983 that MacNaughton was purchasing the property. Menke had never met or had any dealings with the purchaser. She did not attend the closing on August 23, 1983. Nevertheless, Menke accepted a commission of $31,557.75 from the Estate for the sale. She deposited the check in her account on August 24. Within approximately two days after she received the check, she delivered $13,000 in cash to Ryan.

Menke did meet with one real estate purchaser about a purchase of Estate land on August 5, 1983. Walter Scarborough testified that Menke told him that his company would not be able to complete a purchase of real estate from the Estate unless she received the full commission. Menke cited a "special relationship" with Ryan. Scarborough told Menke that he had been represented by another real estate

agent, and would not cut his agent out of the commission. Scarborough testified that when he inquired about Menke's ability to earn a portion of the commission, she aggressively informed him that there would be no sale unless she received the full commission. Scarborough decided not to complete the purchase.

Glen Loggins, a real estate developer, signed an earnest money contract on March 8, 1984 to purchase approximately 443 acres of land from the Estate. The parties to that contract also agreed in writing that the Estate would pay a five percent commission to Peter Morris at closing. Morris was an employee of Tejas Real Estate Services, Inc. This real estate company did not employ Miss Menke. Neither did she assist either party to the contract in the negotiations. Nevertheless, Ryan requested by interoffice memo that a check be prepared in the amount of $97,396.70, payable to Susan Menke Real Estate. He instructed the Comptroller to charge the check to the E. Roark Survey, Fort Bend County. This was the vicinity of the land that Glen Loggins proposed to purchase. Ryan picked up the check, forged the signature of a trustee, and delivered the check to Menke at her place of business. Ryan insisted that the money be split three ways, claiming that another officer of the Estate, Neill F. Amsler, Jr., was also involved in the transaction. Menke deposited the check. Several days later, she wrote two checks to

Mr. Ryan, each for $32,465.56. The checks indicated that they were payments for services Ryan had rendered as a consultant. Ryan had not rendered any such services. The sale of land that the earnest money contract contemplated never occurred.

The evidence is clearly sufficient to support the jury findings on the two questions in the appellant's first point of error. The relevant standard is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt after viewing the evidence in the light most favorable to the verdict of the jury. Lewis v. State, 715 S.W.2d 655, 657 (Tex. Crim. App. 1986). The record is replete with evidence that the appellant accepted two checks totaling $128,954.45 for commissions that she did not earn. Evidence also in the record indicates that Menke knew of Ryan's limited authority to disperse funds. The record affords no reasonable basis for Menke to believe that Ryan had authority to give away the Estate's money by paying her for services never rendered. Moreover, Appellant twice made payments back to Ryan, once in cash and once by two checks. Viewing the record as a whole, a rational trier of fact could have found beyond a reasonable doubts that Appellant knowingly took money without the effective consent of the Estate.

The appellant also argues in her first point of error that the evidence is insufficient to show that

she took the property with the intent to deprive the complainant. She reasons that, in order to prove intent to deprive, the State must show that she either: (1) withheld property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property was lost to the owners; (2) restored the property only upon payment of reward or other compensation; or (3) disposed of the property in a manner that makes recovery of the property by the owner unlikely. This argument clearly misconceives the law applicable to this issue. Under Tex. Pen. Code Ann. Section 31.3 (a), the prosecution must prove the defendant's intent to deprive at the time of the taking. Even if a taking later becomes temporary, the temporary nature of the taking does not automatically negate intent to deprive the owner permanently or for a period long enough to satisfy the statutory definition. Griffin v. State, 614 S.W.2d 155,159 (Tex. Crim. App. 1981). Appellant's return of approximately $48,000.00 at the time she learned that she was under investigation does not indicate that she lacked the necessary intent. When she discovered that she was under investigation, she simply made an effort to return most of the funds that she had not "kicked back" to Ryan. It is clear from the record that a rational jury could have found beyond a reasonable doubt Menke's intent to permanently deprive the owner at the time she acquired the money. The

appellant's first point is overruled.

The appellant's second point of error asserts that the court erred in failing to give the jury one of her two requested charges on section 31.01 (b)(2) and section 31.09 of the Texas Penal Code. The indictment charged as follows:

> ...that in Harris County, Texas, SUSAN D. MENKE hereafter styled the Defendant heretofore on or about August 24, 1983, did then and there unlawfully appropriate by acquiring and otherwise exercising control over property, namely, money, owned by Hermann Hospital Estate, hereafter styled Complainant of the value of over twenty thousand dollars, with the intent to deprive Complainant of the property, and without the effective consent of the complainant.
>
> It is further presented that in Harris County, Texas, SUSAN D. MENKE, hereafter styled the Defendant, heretofore on or before July 10, 1984, did then and there unlawfully appropriate by acquiring and otherwise exercising control over property, namely, money, owned by Hermann Hospital Estate, hereafter styled the Complainant of the value of over twenty thousand dollars,

with the intent to deprive the Complainant of the property, and without the effective consent of the Complainant.

It is further presented that the above thefts were committed and the amounts obtained pursuant to one scheme and continuing course of conduct and the total value of the property was over twenty thousand dollars.

The trial court charged the jury as follows:

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Susan D. Menke, in Harris County, Texas, either acting alone or with Bill Ryan, as a party to the offense, as that term has hereinbefore been defined, and pursuant to one scheme or continuing course of conduct beginning on or before August 24, 1983, and continuing through on or about July 10, 1984, did unlawfully appropriate by acquiring, or otherwise exercising control over property, namely, money, owned by the Hermann Hospital Estate, and the aggregate amount of the property so obtained was over twenty

> thousand dollars with intent to deprive Hermann Hospital Estate of the property, without the effective consent of Hermann Hospital Estate, you will find the defendant guilty as charged in the indictment.
>
> If you do not so believe or you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty".

The appellant first argues that she was not properly charged because the above charge does not correspond with and incorporate the elements of the offense as charged in the indictment. In essence, she argues that the aggregation paragraph of the indictment incorporated the two alleged acts of theft in their entirety. Therefore, Appellant argues that in order to prove the aggregation paragraph the prosecution had to prove (1) the first theft of over $20,000.00; (2) the second theft of over $20,000.00; and, (3) that both thefts occurred pursuant to one scheme and continuing course of conduct. Thus, the appellant argues, the jury charge as given does not require the jury to find all facts necessary to prove the aggregation offense as charged in the indictment.

The appellant's theory in contrary to existing

precedent. See Cooper v. State, 707 S.W.2d 686, 689-90 (Tex. App.-Houston [1st Dist.] 1986, pet. ref'd); see also Cashion v. State, 657 S.W.2d 517, 518-19 (Tex. App. -Corpus Christi 1983, pet. ref'd) (similar indictment and charge, same result). If proof of the same fact or less than all the facts necessary to establish the offense charged also establishes another offense, the other offense is a lesser included offense,. Tex. Code Crim. P. art. 37.09 (1) (Vernon 1981); Cooper, 707 S.W.2d at 689. She reasons that the charge does not allow the jury to find that she committed only one of the thefts. If a defendant requests an instruction on a lesser included offense, and the evidence raises grounds for conviction upon the lesser included offense, the charge should allow the jury to find the defendant guilty of the lesser offense. See Christian c. State, 71 Tex. Crim. App. 566, 572,161 S.W. 101, 102-03 (1913). Uncontroverted evidence demonstrates that Menke acquired money on both occasions. She acquired $31,557.75 on the first occasion and $97,396.70 on the second occasion, for a total of $128,954.45. Nothing in the record indicates that she had earned any real estate commissions. Thus, under the evidence in the record she was either guilty of both thefts or a reasonable doubt remained as to both thefts. Moreover, the appellant did not object or request an instruction that put the trial court on notice that the defendant wanted such an

instruction. Therefore, she has waived any error in this respect.

The appellant reasons further that the charge did not allow the jury to find that she did not commit both thefts, but that a reasonable doubt remained whether she committed the thefts pursuant to one scheme or continuing course of conduct. In fact, the jury charge required the jury to find a scheme or continuing course of conduct, and to find the defendant "not guilty" if it had a reasonable doubt thereof. The appellant's second point is overruled.

Appellant claims in her third point of error that the trial court erred in refusing Appellant's request of charges on what she describes as "affirmative defenses." Defenses do not merely negate an element of the offense. Sanders v. State, 707 S.W.2d 78, 81 (Tex. Crim. App. 1986). If the evidence supporting a defensive theory merely negates an element of the crime, no affirmative defense charge is necessary. Sanders, 707 S.W.2d at 81. The appellant's theory raised only a claim of mistake of fact. The court's instructions to the jury adequately covered that mistake of fact theory. The court instructed the jury that if it had a reasonable doubt as to whether (1) Menke reasonably believed that the Estate had given its effective consent and (2) the mistaken belief negated the necessary culpability, the jury should find her "not guilty." Appellant's third point is overruled.

Menke's fourth point of error is that the trial

court erred in failing to grant her motion to quash the indictment. She argues that, because the indictment failed to specify the manner in which she intended to deprive the Estate of the property, the indictment failed to give her notice adequate to prepare her defense. In support of her position Menke relies on Hoover v. State, 707 S.W.2d 144 (Tex. App. -Houston [14th Dist.] 1986, rev'd in unpublished opinion). Hoover is clearly distinguishable from the present case. However, shortly before this court's decision in Hoover, the Texas Court of Criminal Appeals decided Adams v. State, 707 S.W.2d 900 (Tex. Crim. App. 1986). In Adams, the Texas Court of Criminal Appeals stated:

> The first step in answering this question is to decide whether the charging instrument failed to convey some requisite item of "notice". If Sufficient notice is given, this ends our inquiry. If not, the next step is to decide whether, in the context of the case, this had an impact on the defendant's ability to prepare a defense, and, finally, how great an impact.

707 S.W.2d at 903. Upon remand in Hoover, this court applied the Adams analysis and Opdahl v. State, 705 S.W.2d 697 (Tex. Crim. App. 1986).

Ultimately, this court decided that the defendant had received notice adequate to prepare his defense. In the present case, the description of the offenses in the indictment clearly gave sufficient notice.

The appellant also urges, based on Hoover, that the indictment in the present case would not serve as an adequate bar to future prosecutions. Hence, she argues, the indictment should have been quashed. In Hoover, this court suggested in dicta that the indictment should have been quashed because the State's failure to specify a definition of "deprive" in the indictment created an unacceptable degree of ambiguity. We withdraw this dicta.

A definition of "deprive" was clearly unnecessary to the indictment in the present case. The indictment provided both adequate notice for a fair trial and an adequate ground for a pleas in bar. The appellant's fourth point is overruled.

Menke's fifth point of error charges that the trial court denied her counsel the opportunity to conduct an effective cross-examination of the State's chief witness. At trial, Menke attempted to produce evidence that Ryan had a long history of issuing checks to different fictitious payees, signing his name, and forging a trustee's name. Ryan's past activities were similar to the scheme that the State alleged in the instant case. The appellant contended at trial that evidence of the past forgeries should be admitted (1) to demonstrate the bias of the witness; (2) to place

the witness in his proper context; and (3) to negate her knowledge that she lacked the owner's effective consent when she accepted the money from Ryan. Texas law allows the accused great latitude in showing any fact, including pending charges, which would tend to establish the ill feeling, bias, motive, or animus of any witness testifying against him. Simmons v. State, 548 S.W.2d 386,388 (Tex. Crim. App. 1977). The trial court did permit the appellant to prove that Ryan was under indictment for numerous thefts of money from the Estate. The trial court also allowed Menke to put evidence of Ryan cooperation and prior meetings with the prosecution before the jury. Thus, the trial court allowed the appellant to demonstrate both Ryan's bias and the context in which he testified. However, the trial court's refusal to allow appellant to prove the details of Ryan's previous offenses was questionable because those details tend to negate her knowledge that she was acquiring the property of another without the owner's effective consent. Nevertheless, the trial court's ruling did not diminish her counsel's effectiveness in cross-examining Ryan. The trial court received considerable evidence of Ryan's earlier transactions. Additional evidence regarding these transactions would merely have been cumulative. As a result, admitting further evidence of these transactions would not have made the cross-examination of Ryan more effective. Any error in this ruling on admissibility was

harmless. The appellant's fifth point is overruled.

Menke asserts in her sixth point of error that the trial court erred in denying trial counsel the right to cross-examine and impeach Ryan with his recorded statements about her. The Gaskin rule provides that when a State's witness made a report or statement before testifying, the defendant, after timely request, is entitled to inspect and use the report or statement for cross-examination and impeachment purposes, even though the witness may not have used the instrument to refresh his memory. Gaskin v. State, 172 Tex. Cr. R. 7, 353 S.W.2d 467 (1961). The Texas Court of Criminal Appeals never squarely addressed the applicability of the Gaskin rule to tape-recorded statements until Cullen v. State, 719 S.W.2d 195, 197 (Tex. Crim. App. 1986). Nevertheless, several cases in Texas Court of Criminal Appeals before that time seemed to indicate that he Gaskin rule applied to tape-recorded statements before Cullen. E.g. Buffington v. State, 652 S.W.2d 394 (Tex. Crim. App. 1983) (Onion, J. , concurring, Clinton, J., dissenting); Johnson v. State, 650 S.W.2d 784 (Tex. Crim. App. 1983); Williams v. State, 542 S.W.2d 131 (Tex. Crim. App. 1976). Under Cullen, if a recording consists solely of a witness relating the events of a crime without any questions by the prosecutor, Gaskin applies. 719 S.W.2d at 198. On the other hand, if the recording contains only the work product of the prosecutor, such as comments by the

prosecutor about his trial strategy and his opinions of the strengths and weaknesses of his case, the recording will not be discoverable under Gaskin. 719 S.W.2d at 198. Cullen created a duty for the trial court to review in camera the the recordings that fall between those two extremes and to make a determination about what portions the defendant is entitled to receive and use under Gaskin. Id. After that determination, the defendant is entitled to a copy of the tape from which the portions not discoverable under Gaskin have been excised. Id. If a transcript of the portion of the recording which falls within the Gaskin rule is available, the defendant is also entitled to a copy of that transcript. Id. In the present case, the trial court did not have the benefit of the Court of Criminal Appeals' Cullen opinion. The appellant did have access to the tapes of Ryan's statements. However, the trial court refused to allow her to use a taped statement that directly contradicted Ryan's statements on the witness stand. Mr. Coffee was a trustee of the Estate. Ryan testified that he forged Coffee's name on the first commission check that he gave to Menke. On the tape, Mr. Ryan told the prosecutor that Coffee signed the first commission check that he gave to Menke. This statement was clearly discoverable under Gaskin. The State argues in its brief that this statement concerned an immaterial and collateral issue. Therefore, the State argues, the testimony was properly

excluded. However, the defense was attempting to introduce a recorded statement that directly contradicted the testimony that the State brought out in its own direct examination. The State elicited this information by asking a specific question in an attempt to show the defendant was not attempting to use the witness' recorded statement to impeach the witness or an immaterial and collateral matter. The trial court erred in refusing to allow the defendant to use the witness' recorded statement to impeach the witness.

As a result, this court must determine the harmfulness of the trial court's Gaskin error. 719 S.W.2d at 198. The test for harmfulness of the error is whether the accused was denied effective cross-examination or possible impeachment of the witness. 719 S.W.2d at 197. Careful examination of the record has convinced us that, despite the exclusion of the particular recorded statement at issue, the trial court did not deny the accused effective cross-examination. Furthermore, the evidence in the record so clearly establishes Ryan's bias and so thoroughly destroys his credibility that the exposure of these particular contradictory statements to impeach his statements at trial would merely have been cumulative. Ryan stated during cross-examination that he could not remember what he told the prosecutors on the date the tape was made. He stated before the jury that he would not deny under

oath that he previously told prosecutors the signature was genuine. Clearly, the recorded statement was unnecessary to trial counsel's quite thorough impeachment of the witness regarding Coffee's signature. Therefore, the trial court's breach of the Gaskin rule was harmless error. In accordance with Cullen, Appellant's sixth and final point of error is overruled.

The judgment of the trial court is affirmed.

/s/J. Curtiss Brown
Chief Justice

Affirmed and Opinion filed November 5, 1987.
Panel consists of Chief Justice Brown and Justices Robertson and Cannon.
Publish. TEX. R. APP. P. 90.

NOVEMBER 5, 1987

Fourteenth Court of Appeals
SUSAN DIANE MENKE, APPELLANT
NO. A14-86-00208-CR V.
THE STATE OF TEXAS, APPELLEE

JUDGMENT

This cause came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Court of Appeals, Fourteenth Supreme Judicial District of the State of Texas, at Houston, do hereby certify that the preceding 1 page (s) contain a true and correct copy of Court's judgment in Cause No. A14-86-208-CR, SUSAN DIANE MENKE, Appellant

VS. THE STATE OF TEXAS, Appellee from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 7th day of March, 1989.
MARY JANE SMART Clerk
By Charlene Mitchell Deputy

Appendix B

NO. 420401

THE STATE OF TEXAS	IN THE 183RD DISTRICT OF
v.	HARRIS COUNTY, TEXAS
SUSAN D. MENKE	

JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

Judge Presiding: Joseph Guarino
Date of Judgment: 11-11-85
Attorney for State: Don Strickland & Bill Taylor
Attorney for Defendant: Marion Rosen Michael Von Blon
Offense Convicted of: theft as charged in two paragraphs of the indictment
Degree: 2nd Date Offense Committed: 8-24-83 & July 10, 1984
Charging Instrument: Indictment
Plea: Not Guilty
Jury Verdict: Guilty Foreman: Tom W. Penn
Plea to Enhancement: Enhancement
Paragraph (s) : N/A Paragraph (s): N/A
Findings on Use of Deadly Weapon : N/A
Punishment Assessed by: Joseph Guarino - Judge

Date Sentence Imposed: 1-27-86 Costs: $42.00
Punishment and Place of Confinement: 4 Years TDC
Date to Commence: 1-26-86
Time Credited: N/A
Total Amount of Restitution/Reparation: N/A
Concurrent Unless Otherwise Specified.

BILL OF COSTS

CLERK'S FEES

Clerk's Fee:

SHERIFF'S FEES

Serving:	Copies & Mileage:
Summoning:	Witness & Mileage:
Jury Fee:	
Taking:	Bonds:
Committment:	
Release:	
Attachment:	
	Total:

TEXAS DEPARTMENT OF CORRECTIONS
TIME ASSESSED: 4 years
CREDIT: Sentence to begin 1-26-86
Additional Credit N/A Days

RECAPTITULATION

Fine:
Misc. Cost:

Trial Fee:
District Atty's Fees:
Clerk's Fees:
Sheriff's Fees:
Jury Fees:
Crim. Justice Planning Fund:
L.E.O.S.E.F.:
C.V.C.F.:
Attorney Fees:
Witnesses:
JCPTF
Total:

Signed and entered this the 27th day of January A.D. 1986
Notice of Appeal: N/A
PRESIDING JUDGE: Joseph M. Guarino

DATE SIGNED:1-27-86 (12:00 pm)
Motion for new trial filed
Bond set at $2,000.00 pending motion for new trail
On this the 17th day of March A.D. 1986, Defendant's Amended motion for new trial is overruled & denied.

Appendix C

DENIED
1-18-89

No. 0084 - 88

IN THE COURT OF CRIMINAL APPEALS
FOR THE
STATE OF TEXAS

SUSAN D. MENKE,
Appellant,
VS.
THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from The First Supreme Judicial District of Texas at Houston in No. 14-86-00208-CR, affirming the conviction in Cause No. 420,401 from the 183rd Judicial District Court in Harris County.

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

BERG & ANDROPHY

DAVID H. BERG
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

ATTORNEY FOR APPELLANT
SUSAN D. MENKE

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No.

IN THE COURT OF CRIMINAL APPEALS
FOR THE
STATE OF TEXAS

SUSAN D. MENKE,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from The First Supreme Judicial District of Texas at Houston in No. 14-86-00208-CR, affirming the conviction in Cause No. 420,401 from the 183rd Judicial District Court in Harris County

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

STATEMENT OF THE CASE

Appellant was charged by indictment (R.I.5) with theft under Section 31.03 (b) (1) and Section 31.09, V.T.C.A. Penal Code. The indictment contains three paragraphs. The first two paragraphs

charge Appellant with theft, one which allegedly occurred on August 24, 1983; the second, on July 10, 1984. The third paragraph charges that the two thefts were committed and the amounts obtained pursuant to one scheme and continuing course of conduct.

The State proceeded on circumstantial evidence. Their theory was that Appellant acted as a party with William B. Ryan in two acts of theft perpetrated against the Hermann Hospital Estate. In addition, the State argued and presented evidence that Appellant took money for real estate transactions where she had not located the buyer.

The defensive theory was that Appellant received two real estate commissions from the Hermann Hospital Estate. The defense argued and presented evidence that Appellant had no reason to believe the real estate commissions were not authorized by the Hermann Hospital Estate.

Further, Appellant testified that she had done work for the estate, and therefore she believed the Estate awarded her commissions for that work. Moreover, Ryan held himself out to her as an authorized agent of the Estate, and she believed the commissions were issued with the effective consent of the owner.

PROCEDURAL HISTORY

Appellant pled not guilty to the offense of aggregated theft. Appellant was convicted by a jury in the 183rd Judicial District Court of Harris County, Texas of the offense of theft committed pursuant to one scheme or course of conduct in cause number 420,401. The judge assessed punishment of four years imprisonment in the Texas Department of Corrections. Sentence was pronounced on January 27, 1986. A Motion for New Trial was filed and overruled on March 17, 1986. Notice of appeal to the Fourteenth Court of Appeals was given on March 17, 1986, briefs were timely filed and oral argument presented. The conviction was affirmed by the Court of Appeals on November 5, 1987; motion for rehearing was overruled on December 10, 1987.

GROUND OF REVIEW NUMBER ONE

THIS CAUSE SHOULD BE REMANDED TO THE TRIAL COURT TO GIVE APPELLANT AN OPPORTUNITY TO DEMONSTRATE HARM UNDER ADAMS V. STATE 707 S.W.2d. 900 (TEX.CR.APP. 1986)

In Appellant's point of error four, she argued that the trial court erred in failing to grant her motion to quash, wherein she requested that the State notify

her in what manner she "deprived" the complainant of the property. See 31.01(3), V.A.P.C.

Cases concerned with "notice" agree that a trial court should grant a motion to quash when a defendant requests notice concerning which of several definitions of an element of an offense that the State intends to proceed on. Legions of cases hold that when a statutory definition provides for more than one manner or means to commit an act, a motion to quash on those grounds should be granted by the trial court. However, with the advent of Adams v. State, 707 S.W.2d 900 (Tex. Cr. App. 1986), an appellant seeking relief from a trial court's erroneous denial of a motion to quash must demonstrate harm. While Adams changed the standard of review on appeal, it did not impair the long-standing rule that a trial court should grant a motion to quash when a statute provides several different ways that an offense may be committed. See and cf. Washington v. State, 675 S.W.2d 239 (Tex. App. —10th Dist. 1984); Bertram v. State, 670 S.W.2d 305 (Tex. App. —7th Dist. 1983, pdr.ref.); McBrayer v. State, 634 S.W.2d 504 (Tex. Crim. App. 1982); Norman v. State, 634 S.W.2d 681 (Tex. Crim. App. 1982).

When this Court reviewed Appellant's argument that she did not receive notice of which statutory definition of deprive that the State intended to proceed on, this Court acknowledged that in Hoover v. State, 707 S.W.2d 144 (Tex. App. —Houston [14th dist.] 1986, rev'd in unpublished opinion), it found

error where the trial court did not grant a motion to quash similar to that urged by Appellant. As the Menke opinion pointed out, Hoover was remanded for analysis under Adams v. State, 707 S.W.2d 900 (Tex. Cr. App. 1986). The Court then states, referring to the unpublished Hoover opinion:

> Upon remand in Hoover, (referring to the unpublished opinion) this court applied the Adams analysis and Opdahl v. State, 705 S.W.2d 697 (Tex. Crim. App. 1986). Ultimately, this court decided that the defendant had received notice adequate to prepare his defense.

Appellant respectfully urges this Court to consider what it actually held in the unpublished Hoover opinion. In Hoover II, this Court, employing an Adams analysis, did in fact find that there was a failure of notice, but that failure caused no harm to Appellant. See Hoover II, p.2. (Attached hereto as Exhibit A). Appellant also urges the Court to consider the well-established rule that a motion to quash should be granted when a statute provides more than one definition of an element of a criminal offense.

In the very recent case of Janecka v. State, S.W.2d (Tex. Cr. App. No. 68,881, delivered November 12, 1987), the Court of Criminal Appeals held:

> In this motion for rehearing, appellant points out Adams v. State, supra, was decided after the instant cause was tried. Under such circumstances, appellant urges this Court should remand the cause to the trial court to give Appellant an opportunity to demonstrate harm under the Adams v. State, supra, analysis. We agree.

Similarly, Appellant Menke's trial took place before the Court of Criminal Appeals handled down Adams. Menke was sentenced on January 27, 1986; Adams was handed down February 5, 1986. Accordingly, under Janecka, and the previously cited motion to quash cases, this cause should be remanded to the trial court in order to allow Appellant to show harm as required by Adams.

GROUND OF ERROR NUMBER TWO

IN LIGHT OF THE RECENT CASE, VIRTS v. STATE, THIS COURT ERRED WHEN IT FOUND NO HARM IN THE TRIAL COURT'S ERRONEOUS TRUNCATION OF APPELLANT'S CROSS-EXAMINATION OF RYAN, ACCOMPLICE WITNESS, AND THE ONLY FACT WITNESS AGAINST APPELLANT

The record in this cause shows that Appellant

was allowed to question Ryan about the bare fact that he was under indictment for theft. The record further reveals that appellant was not allowed to show the jury that Ryan has been stealing from the estate for years, using a scheme that was remarkably similar to the scheme that Menke was charged with. Most important, Appellant was not allowed to show that Ryan had successfully forged Trustee Coffee's signature many times in the past. This information was obviously critical to Appellant's defensive theory —she thought the Estate had consented to the disbursement of the funds because Trustee Coffee signed the checks she received. Trial counsel made it clear to the trial court that she wanted to place the events in their proper context: The thefts were Ryan's brainchild and Menke was his naive dupe.

While finding error, this Court found no harm for the following reasons:

> 1. The trial court had "received considerable evidence of Ryan's earlier transactions."
>
> 2. "Additional evidence regarding these transactions would merely have been cumulative." (slip. op., p. 10)

As to the first reason, the record shows that the jury only heard the bare fact of Ryan's indictment. There was absolutely no evidence concerning the nature of the theft transactions before the jury. As to the

second reason, additional evidence would not have been cumulative, considering that the jury only had the bare fact of indictment to consider when assessing Ryan's testimony. Certainly if the jury knew that Ryan had been involved, sans Menke, in many similar theft schemes wherein he forged Trustee Coffee's signature, they might have looked askance at his testimony claiming that Menke was a knowing participant in his scheme.

Appellant urges this Court to acknowledge the harm that occurred and reverse this case, thus allowing Appellant an opportunity to effectively cross-examine Ryan, who was the only fact witness against her.

Appellant further shows this Court that the Court of Criminal Appeals does not apply a harm analysis to denial of effective cross-examination:

> ... the law is clear that a showing of want of prejudice cannot cure a denial of the right of effective cross-examination. Harris v. State, 642 S.W.2d 471, 480 (Tex. Crim. App. 1982).

As the Court of Criminal Appeals held in Harris, a harm analysis is inappropriate because cross-examination is the only way a material witness may be placed in his "proper setting as regards his testimony." 642 S.W.2d at 476. Consider the situation: Ryan was an accomplice witness; he was the only

witness who testified as to the facts of the theft. Thorough cross-examination of Ryan was the only way Menke could defend herself.

Take this facts and consider then in light of the recent opinion styled Virts v. State, S.W.2d (Tex. Cr. App., No. 1169-84, delivered October 21, 1987 [no dissent]). This Court did not have the opportunity to consider the Virts case before analyzing the cross-examination error.

Virts affirmed the principle that accomplice witness are "usually deemed corrupt and their testimony should always be looked upon with suspicion." Accordingly, "any available evidence that might affect such a witness's credibility should be admitted so that the jury might use it in making the determination of how much weight it should give the witness's testimony." (emphasis added) Virts, slip op., p.2

In addition, the Court held that, for a criminal defendant, the "greatest constitutional right .... is the right to confront and cross-examine the State's witnesses." (slip. op. p.7). Of course, cross-examination includes the right to "impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility." (slip. op., p. 7).

As Virts holds, cross-examination is particularly crucial when a citizen stands to be convicted by the testimony of an accomplice. Allowing the jury to hear only the bare fact of Ryan's indictment was simply

not enough. The jury was not even allowed to know that Menke had nothing to do with the prior thefts. There was no cogent reason for the trial court to deny Appellant effective and thorough cross-examination of an accomplice witness.

Assuming that harm analysis is appropriate, Appellant was harmed because the jury was not able to see Ryan for what he was, a master thief who had been duping people for years. In light of the Virts holding that cross-examination is particularly critical when a defendant is confronted by an accomplice witness, this Court should find harmful error and remand this cause to the trial court.

GROUND OF REVIEW NUMBER THREE

THE COURT ERRED IN ITS APPLICATION OF CULLEN V. STATE, 719 S.W.2d 195 (TEX. CR. APP. 1986).

In its analysis of Appellant's sixth point error, this Court found no harm in the trial court's Gaskin error. As the Court held, the appropriate test is whether Appellant was denied effective cross-examination or possible impeachment. Cullen, 719 S.W.2d 195, 197.

This Court found no harm, finding that any possible impeachment would have been cumulative because, in response to trial counsel's question whether he had once told the prosecutors that the

signature was genuine, Ryan testified that he could not remember what he told the prosecutors about Trustee Coffee's signature, nor could he deny under oath that he had previously told the prosecutors that the signature was genuine. This Court then concludes that it is "clear" that the recorded, contrary statement was unnecessary to trial counsel's quite thorough impeachment of the witness regarding Trustee Coffee's signature. How could the following be considered "thorough" impeachment:

> Q (By Mrs. Rosen) ... I'm asking if that is -- with reference to that check, you did not make the statement on the tape recording that Mr. Coffee actually signed the check?
>
> A (By Ryan) I don't remember. (R. 1x-20)

It would not have been cumulative for trial counsel to have produced the tape recording wherein Ryan told the prosecutor that Trustee Coffee actually signed the first commission check that he gave to Menke. Ryan's statement that he would not deny under oath that he once said the signature was genuine does not constitute a thorough impeachment. Rather, that statement, coupled with the above "I don't remember," says to the jury "maybe I did, maybe I didn't." Ryan was straddling both sides

of the fence. He should not have been allowed to get away with such dodging of the critical issue in the case —his credibility.

If trial counsel had been allowed to play the tape wherein he definitely said Trustee Coffee's signature was authentic, the jury would have realized the man was a liar; or, at best, he had a convenient memory lapse. As it stands, the jury only heard his trial testimony where he danced around trial counsel's question by saying "I'm not sure, I don't remember."

Moreover, Judge McCormick, writing in Cullen, held no reversible error occurs when the prior recording is "entirely consistent with ... testimony at trial." 719 S.W.2d at 199. In this case the prior recording is not consistent with Ryan's trial testimony. Thus Appellant was denied possible impeachment. Under Cullen, this case should be reversed and remanded.The Cullen error is compounded because Ryan was an accomplice witness and the only fact witness testifying as to the theft with which the Appellant was charged. From the accused's point of view, the only witness who needed to be impeached was Ryan. Thus, the trial court's denial of possible impeachment was extremely harmful to the Appellant. Under Virts supra, harmful error should be found because as Virts held:

> ... any available evidence that might affect such a witness's credibility [referring to an accomplice witness] should

> be admitted so that the jury might use it in making the determination of how much weight it should give witness's testimony. Virts, slip op. p. 2 (emphasis added).

Because Virts underscores the harm that results when a defendant is denied the opportunity to impeach an accomplice witness, this Court should reverse and remand because of the Cullen error committed by the trial court.

GROUND OF REVIEW NUMBER FOUR

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED CHARGES ON APPELLANT'S AFFIRMATIVE DEFENSES

Appellant's counsel requested that the following instruction be included in the court's charge to the jury:

> You are instructed that if you believe at the time Susan Menke received the checks, Susan Menke believed that William Ryan was legally authorized to act for the Hermann Hospital Estate, and that he consented to Susan Menke's receipt of those checks, or if you have a reasonable

> doubt thereof, you will acquit Susan Menke and find her not guilty.

In fact, Appellant's counsel submitted two charges which centered on Appellant's defensive theory that Ryan was an agent of the Estate. The second one is:

> Your are instructed that if you believe that at the time Susan Menke cashed the checks in this case, she believed that the checks were hers, or if you have a reasonable doubt hereof, you will acquit the accused and find her not guilty.

The trial court refused this requested instruction. (R. XI-1349).

Before examining the testimony to determine whether one of the above charges were warranted, it is worth reiterating some general rules regarding jury instructions.

Most important, a defendant is entitled to a charge on every issue raised by the evidence, regardless of whether the evidence is strong, feeble, impeached or contradicted. Warren v. State, 565 S.W.2d 931 (Tex. Crim. App. 1979); Isbell v. State, 681 S.W.2d 640 (Tex. App. -Houston (1st) 1984); Gilmore v. State, 666 S.W.2d 136 (Tex. App. -Amarillo 1983). Once an issue is raised by the evidence, it cannot

then be negated by other evidence, whether strong, weak, unimpeached or contradicted. Borns v. State, 674 S.W.2d 879 (Tex. App. -Dallas 1984). Such evidence may be produced by the State or the defendant. Lugo v. State, 667 S.W.2d 144 (Tex. Crim. App. 1984).

Does the evidence in this case raise the issue that Appellant believed Ryan (along with trustee Coffee) was legally authorized to award her a commission? And does the evidence raise the issue that Appellant believed she had a right to the money? On cross-examination Appellant testified as follows:

> "I just thought of Mr. Ryan as the head of the Estate and was in charge of all the real estate operations."

And, on direct examination, Appellant testified:

> "He (Ryan) called and told me the Estate was selling a tract of land. There was no other broker involved, and he would like to co-broker with me, because of all the research work that I had done for the Estate..."
>
> (R. X-1008)

And:

> "He (Ryan) did tell me that he wanted to co-broker this deal with me

> because to try to give me ... to make up for the fact that Mr. Loggins had not remembered me showing him that property."
>
> (R. X-1034)

Thus, it is clear issues were raised as to Whether Appellant believed that Ryan was legally authorized to award her a commission and whether she believed the commissions were rightfully hers, and not as the Court of Appeals held merely to negate intent.

A similar issue was raised in Smith v. State, 458 S.W.2d 923 (Tex. Crim. App. 1970), wherein defendant was convicted for theft of sheep.

In that case, the defendant testified that he believed that the rightful owner authorized him to take the sheep. The Court of Criminal appeals held that the question of whether Appellant believed that he had permission to take the sheep was a material affirmative defense and should have been submitted to the jury in the court's charged. The requested charge in Smith read as follows:

> You are charged that if you believe that at the time the accused helped load the sheep in the trailer ... he believed that the sheep were the property of the complainant, or if you have a reason

able doubt, you will acquit the defendant.

The Smith court relied on Lovern v. State, 128 Tex.Cr.R. 210, 80 S.W.2d 98 (1935), wherein the Court held: "The charge on this issue pointedly told the jury that if the testimony raised in their minds a reasonable doubt as to whether Appellant knew or believed the turkeys to be his, they should acquit him." (emphasis added). Such was held to be a proper charge.

In the case at bar, the Court refused charges similar to those approved in Smith and Lovern, supra. As in those cases, the question of what Appellant believed was a material affirmative defense, and at least one of the requested charges should have been submitted to the jury in the court's charge. As a recent case held, where an accused admits his acts, but attempts to justify them "in the same manner as an affirmative defense, this justification must be included in the court's charge to the jury." Willis v. State,____ S.W.2d____ (No. 05-85-569-Cr., Dallas, delivered August 11, 1986).

While, in this case, the Court did give a charge on mistake of fact, the charge given did not pointedly assert Appellant's affirmative defense that she believed that Ryan (along with Trustee Coffee) was authorized to award her a commission and/or that she believed she was entitled to the commissions. Lovern, supra. The charge read:

> If you find from the evidence or if you have a reasonable doubt thereof that the dates, either one or both, alleged in the indictment, the defendant reasonably believed that Hermann Hospital Estate had given its effective consent to payments made to the defendant, and you further find that the mistake belief negated the kind of culpability required for the commission of this offense, then you will acquit the defendant and say by your verdict not guilty. (Emphasis added)
>
> (R. I-239)

This charge did not adequately and pointedly reflect Appellant's defensive theory. Her entire defensive theory was that she believed Ryan (not the Estate itself as the above charge states) was authorized to act for the Estate, and that she believed that the money was properly hers, because she though Ryan had the authority to award her a commission if he so chose. As the Lovern court held, trial counsel's requested charges pointedly and properly raised Appellant's affirmative defense. As in Lovern and Smith. the question whether Appellant believed Ryan was authorized to award her a commission and whether she felt she was entitled to the money were material affirmative defenses, and, therefore, at

least one of the requested charges should have been submitted to the jury. Because the trial court refused Appellant's requests, the case should be reversed and remanded for a new trial.

GROUND OF REVIEW NUMBER FIVE

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO QUASH THE INDICTMENT

Appellant filed a timely Motion to Quash the Indictment, arguing that the indictment failed specify the manner in which she intended to "deprive" the complainant of the property. She also argued the issue in open court. (R. II-6, 10). In her Motion, Appellant pointed out that "deprive" is defined in several ways by Section 31.01 (3), V.A.P.C.:

> (A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner;
>
> (B) to restore property only upon payment of reward or other compensation; or

> (C) to dispose of the property in a manner that makes recovery of the property by the owner unlikely.

In Hoover v. State, 707 S.W.2d 144 (Tex. App. — Houston (14th Dist.) February 13, 1986, p.d.r. pending), the Court point out that Section 31.03 (3) provides:

> Three different and distinct ways of establishing the accused's conduct. The accused is left to guess or assume that the State is going to prove one or all of the types of conduct. It is clear that even though an act or omission by a definition provides for more than one manner or means to commit that act or omission, then upon timely request, the State must allege the particular manner or mens it seeks to establish (707 S.W.2d at 148).

Clearly, in the case at bar, upon Appellant's proper motion, the State should have alleged the manner and means it sought to establish.

In Adams v. State, S.____W.2d____ , (Tex. Crim. App. No. 364-86, February 2, 1986), the Court set forth the following analysis to be utilized when considering a motion to quash:

> The important question is whether a defendant had notice adequate to prepare his defense. The first step in answering this question, but only the first step, is to decide whether the charging instrument failed to convey some requisite item of "notice." The next step is to decide whether, in the context of the case, this had an impact to the defendant's ability to prepare a defense, and finally, how great an impact.

In Hoover, the Court applied the two-step Adams analysis. The first step of the Adams test has been answered by Hoover in its holding that, because "deprive" is defined in several ways, the accused, on timely motion, is entitled to more particular notice.

The second step of Adams is whether the lack of notice has an impact on the defendant's ability to prepare a defense. Appellant argues that had she had notice of how she allegedly "deprived" the complainant, her preparation for trial would have focused on contesting that particular method of deprivation. As the Hoover court held, Appellant was "deprived of a fair and adequate notice of the charges against [her] so as to adequately prepare a defense." 707 S.W. 2d at 148; Adams, supra.

Moreover, the indictment in the instant case does not serve as an adequate bar to future prosecutions.

As Hoover held, if the State had failed to prove Hoover "deprived" the complainant because he returned her property only upon payment of reward or compensation, nothing in the record indicated that the State could not reindict Hoover and attempt to show he "deprived" by keeping the property for such a period of time that a major portion of the value or enjoyment of the property was lost. Hoover at 148.

The same analysis applies to the case at bar. In Menke, the State attempted to prove deprivation through Section 31.03 (3) (A) (withholding property for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner). If the State had or has failed (see point of error 2b) to prove that contention, there is nothing in the record to indicate that they could not reindict appellant and attempt to establish appellant took the money and disposed of it in a manner that made recovery of the property by the owner unlikely. Hoover, supra and see Section 31.01 (3) (C), V.A.P.C.

The indictment failed to give adequate notice, which adversely affected the defense's preparation for trial. Further, the indictment does not serve as a bar to future prosecutions. Accordingly, the trial court erred in denying appellant's motion to quash. The judgment should be reversed and the cause remanded to the trial court with instructions to dismiss the indictment.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court grant this Petition for Discretionary Review. If, however, the Court of Criminal Appeals refuses review of the opinion below, Appellant prays that the Court of Criminal Appeals order the Fourteenth Court to publish the opinion they issued in this cause.

Respectfully submitted,

BERG & ANDROPHY

BY: _____

DAVID H. BERG
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

COUNSEL FOR APPELLANT
SUSAN D. MENKE

CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review has been served upon counsel for the State by mailing a copy to Roe Morris of the Appellee Division of the Harris County District Attorney's Office, and the State Prosecuting Attorney, by placing same in the United States mail on this day of January, 1988, addressed as follows:

Hon Robert Huttash
State Prosecuting Attorney
P.O. Box 12405
Austin, Texas 78711

DAVID H. BERG

CERTIFICATE OF HAND-DELIVERY

I do hereby certify that filing of the foregoing Appellant's Petition for Discretionary Review was accomplished this the day of January, 1988, by hand-delivering an original and ten copies to the Fourteenth Court of Appeals in Houston, Texas.

DAVID H. BERG

Appendix C

COURT OF CRIMINAL APPEALS
JANUARY 18, 1989

APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW REFUSED:

0984-87 BENITEZ, JUAN HOOD COUNTY 02-86-00204-CR
(JUDGES CLINTON & TEAGUE WOULD GRANT)

1154-87 CORTEZ, RICHARD W. TRAVIS COUNTY 03-86-00287-CR
(JUDGE TEAGUE WOULD GRANT)

1237-87 RODRIGUEZ, MARTIN TARRANT COUNTY 02-86-00189-CR

1238-87 RODRIGUEZ, RAMIRO TARRANT COUNTY 02-86-00190-CR

1307-87 BALLS, CLAUDE ANTHONY HARRIS COUNTY 14-86-00830-CR

0084-88 MENKE, SUSAN D. HARRIS COUNTY 14-86-00208-

Appendix D

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.-CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REP RESENTATION; DISQUALIFICATION OF OFFICERS;PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

28 SECTION 1256 SUPREME COURT - JURISDICTION. CH. 81.

SECTION 1257. State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United Stated and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646,62 Stat. 929.

Appendix E

APPELLATE COURT NO.
IN THE COURT OF APPEALS
OF THE STATE OF TEXAS

SUSAN D. MENKE, APPELLANT
VS.
THE STATE OF TEXAS, APPELLEE

APPEAL FROM THE 183RD DISTRICT COURT OF
HARRIS COUNTY, TEXAS
JUDGE JOSEPH . GUARINO

MARILYN J. SEE
Official Court Reporter
183rd District Court
Harris County, Texas

VOLUME 5 OF 14 VOLUMES

.... The Court will order that those be furnished her, copies of those deposit slips.

What else, Mrs. Rosen?

MRS. ROSEN: Your Honor, during this time frame, beginning in 1978 through 1984, what Mr. Ryan did is issue to three, fictitious names a number of checks from Hermann Hospital Estate, and he signed his name, and then he forged the name of another trustee.

We should be entitled, Your Honor, to determine whether those checks were deposited into Mr. Ryan's account.

THE COURT: On what basis, Counsel? What is the relevancy?

MRS. ROSEN: In connection with the two checks in this case that were paid to Ms. Menke by Hermann Hospital Estate, by his own statements, he forged the name of John Coffee, a trustee. He had previously forged his name on these other checks and, Your Honor, it establishes a pattern that he had followed for lo the many years, showing his practice of what he had done in the past, and I think in that regard, it is exculpatory.

For example, if he now comes up with the idea: Well, it was Ms. Menke's idea, or we worked together to determine I was going to forge these....

Appendix F

CAUSE NO. 420, 401

THE STATE OF TEXAS
VS
SUSAN D MENKE

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS
NOVEMBER TERM, A.D., 1985

APPEARANCES:

For the State of Texas:
Mr. Don Stricklin and
Mr. Bill Taylor
Assistant District Attorneys
Harris County, Texas

For the Defendant:

Mrs. Marian S. Rosen and
Mr. Michael P. Von Blon
Attorneys at Law
Houston, Texas

VOLUME 9 OF 14 VOLUMES

.... of Mr. Coffee. If this was the same thing given to me on the date you're bringing up, then I would say the same thing.

Q Do you recall the question being asked, by Mr. Taylor, Bill Taylor, the gentleman sitting right over here, next to Mr. Stricklin, in response to a question that Mr. Taylor asked you, as follows, and this is talking about Mr. Coffee: He did sign the first commission check, re commission of 42.77 acres, David Bright Survey, Fort Bend County, and your answer: Yes, sir; was not a correct statement?

A. Mrs. Rosen, again, I would have to see it.

At that time, if I looked down there and I saw Mr. Coffee's signature, I would have so stated to Mr. Taylor and Mr. Stricklin: This is Mr. Coffee's signature.

If I looked down there and saw that it was a forged signature, by me, I would have said that.

Q. You had forged Mr. Coffee's signature on many occasions; had you not?

MR. STRICKLIN: Objection, Your Honor, Irrelevant.

THE COURT: Sustained. don't answer.

MR. STRICLIN: I ask it be stricken

.... I can look at that signature and tell you if it's Mr. Coffee's or mine.

If you want me to do it with these two items, I will be happy to do it, with these two.

Q Would you look at Exhibit 1a and will you tell me if that check refers to a commission check on 42.77 acres of the David Bright Survey, Fort Bend County?

A Which number? 2a?

Q 1a, Exhibit 1

A Exhibit 1 is a copy of a check, photostat copy, relating to approximately 42 acres of land in the David Bright Survey.

Q Fort Bend County?

A Fort Bend County, dated August 23, 1983

Do you want the amount and who it was paid to?

Q No. I'm asking if that is —with reference to that check, you did not make the statement, on the tape recording, that Mr. Coffee actually signed that check?

A I don't remember.

(203)

MRS. ROSEN: Your Honor, we would request that the District Attorney's Office produce the tape recording of February 13, 1985, for the

(203 Cont'd)

....

A No. The check request follows the blue.

Q So, you prepared the blue requisition form first, then a yellow check request is prepared and was approved by you and a check was issued?

A Yes, ma'am

Q When the check was issued, was that delivered to you by either Mr. Shimp or Ms. Beene? How was that handled.

A Yes, it was given to me.

Q By whom?

A Either Mr. Shimp or Ms. Beene.

Q Was it given to you with a number of other checks that were issued that day, or was it given to you as a sole check that was handed to you?

A Single item.

Q And you have testified that you signed your name and you forged Mr. Coffee's name?

A That's correct.

Q That was not the first time that you had forged Mr. Coffee's name?

MR. STRICKLIN: Objection, Your Honor.

THE COURT: Sustain the objection. Don't ask that question again, counsel.

(267 Cont'd)